IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Protecting Arizona's Resources and Children, et al., and Gila River Indian Community,

Plaintiffs,

v.

Federal Highway Administration, et al.,

Defendants.

No. CV-15-00893-PHX-DJH
No. CV-15-01219-PHX-DJH

ORDER

This matter is before the Court on the Motion for Summary Judgment (Doc. 95) and Amended Statement of Facts (Doc. 101) filed by Plaintiffs Protecting Arizona's Resources and Children, et al. (the "PARC Plaintiffs")[1]; the Motion for Summary Judgment (Doc. 97) and Statement of Facts (Doc. 98) filed by Plaintiff Gila River Indian Community ("GRIC")[2]; the Cross-Motion for Summary Judgment (Doc. 102), Statement of Facts (Doc. 103), Response to Plaintiffs' Motions for Summary Judgment (Doc. 104) and Controverting Statements of Facts (Docs. 105, 106) filed by Defendants Federal

[1] The PARC Plaintiffs include The Foothills Community Association; The Foothills Club West Community Association; The Calabrea Homeowners Association; The Lakewood Community Association; The Sierra Club; The Phoenix Mountains Preservation Council; Don't Waste Arizona; and the Gila River Alliance for a Clean Environment.

[2] On June 30, 2015 in CV 15-1219-PHX-DJH, GRIC filed a Complaint for Declaratory and Injunctive Relief against the same Defendants. (Doc.1). Thereafter, GRIC filed a Motion to Consolidate that case with the PARC Plaintiffs' case pursuant to Fed.R.Civ.P. Rule 42 and the Court granted that motion, in part, on July 29, 2015. (Doc. 71).

Highway Administration ("FHWA") and Karla Petty, Arizona Division Administrator for FHWA (collectively, "Federal Defendants"); and the Cross-Motion for Summary Judgment (Doc. 107), Statement of Facts (Doc. 108), Memorandum of Points and Authorities (Doc. 109), and Joinder in Federal Defendants' Controverting Statements of Facts (Doc. 110) filed by Defendants Arizona Department of Transportation ("ADOT") and its Director, John S. Halikowski (collectively, "State Defendants"). The PARC Plaintiffs and GRIC each filed a Reply in Support of Their Motion for Summary Judgment and Response in Opposition to Defendants' Cross-Motions (Docs. 113, 115), along with additional Statements of Fact (Docs. 114, 116, and 117). Finally, the Federal Defendants and the State Defendants each filed a Reply (Docs. 120, 121) in support of their Cross-Motions for Summary Judgment.

The Federal Defendants, as directed, filed a Notice of Lodging of Administrative Record (Doc. 90) on November 16, 2015.[3] On December 29, 2015, the Federal Defendants filed a Notice of Lodging Additional Administrative Record Documents (Doc. 92), and on May 24, 2016, they filed a Second Notice of Lodging Additional Administrative Record Documents (Doc. 126). That voluminous record is more than 70,000 pages and contains numerous analytical summaries and reports.

The Court heard more than four hours of oral argument on May 11, 2016. The Court took the matter under advisement and now issues its written order.

I. Introduction[4]

The Plaintiffs in this consolidated action, PARC and other community organizations, and GRIC, a federally recognized Indian tribe, are challenging Defendants' evaluation and approval of the Loop 202 South Mountain Freeway project (the "Freeway Project"), which would complete the Loop 202 Freeway from the I-10

---

[3] A corrected version of the Cultural Resources Administrative Record, a portion of the overall administrative record, was submitted the next day on November 17, 2015. (Doc. 91).

[4] Unless otherwise indicated, the following facts are not in dispute and are an amalgamation of, and taken nearly verbatim from, the parties' separate supporting and controverting statements of fact. (Docs. 98, 101, 103, 105, 106, 108, 114, 116 and 117)

Maricopa Freeway to the I-10 Papago Freeway. The proposed eight-lane, approximately 22-mile long freeway would consist of an Eastern Section and a Western Section. The Eastern Section is proposed to begin at the existing I-10 and Santan Freeway interchange and extend westward along Pecos Road in Ahwatukee. The freeway would run just north of and adjacent to the exterior boundary of the GRIC land which lies just south of Pecos Road. The Western Section is proposed to connect with the Eastern Section near 59th Avenue and Elliot Road and extend north before linking to the I-10 Papago Freeway near 59th Avenue. In order to connect with the I-10 Papago Freeway, the freeway would cut through approximately 31.3 acres of the Phoenix South Mountain Park Preserve ("SMPP"). The freeway would cut through three ridgelines of the South Mountains, two of which are within SMPP, which is one of the largest municipally-operated parks in the world. The SMPP and surrounding areas are considered sacred to the GRIC as they contain sacred and natural resources and cultural properties which are still used by GRIC religious practitioners today.

Plaintiffs contend that Defendants violated their obligations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, and Section 4(f) of the Department of Transportation Act ("Section 4(f)"), 49 U.S.C. § 303(c), "to carefully, objectively, and thoroughly identify issues, assess alternatives, and minimize adverse impacts." (Doc. 97 at 8).[5] They argue that critical flaws in Defendants' evaluation and decision-making process have resulted in a decision to approve the Freeway Project that was arbitrary, capricious and an abuse of discretion. Among other arguments, the PARC Plaintiffs assert that the Defendants' NEPA process was designed to rationalize a preordained decision and that they did not adequately consider the potential health effects to children who live and attend school near the propose freeway. Similarly, GRIC asserts that the Defendants relied on incomplete data and did not evaluate the unique impacts of the project on their community, its members or the affected animal and plant life in the

[5] Unless otherwise indicated, the Court's citations to filed documents reflect the docket number(s) and page number(s) generated by CMECF, the Court electronic filing and case management system. The Court's citations to documents filed by the parties do not refer to pre-printed page numbers on such documents.

SMPP. Plaintiffs therefore request that the Court grant summary judgment in their favor and enjoin all construction and other action being taken in furtherance of the Freeway Project until Defendants comply with all applicable laws and regulations.

Defendants respond that they have strictly adhered to the procedures required by federal law. They claim that the Freeway Project "reflects a considered policy choice by ***all*** state and federal transportation and planning agencies regarding solutions to the severe congestion in the I-10 corridor, and the mobility challenges attendant to a growing economy and population." (Doc. 109 at 14). They contend that Plaintiffs' disagreement with this policy choice is not a sufficient basis to invalidate Defendants' approval of the Freeway Project. Defendants argue that Plaintiffs have not met their burden to show Defendants' approval of the Freeway Project was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (Doc. 102 at 2) (quoting 5 U.S.C. § 706(2)(A)).

Defendants further explain that their evaluation and analysis included an extensive NEPA scoping process that involved forming a Citizens Advisory Team, in which Plaintiffs were represented, that met approximately 60 times over a twelve-year period to provide input into the process. (Doc. 109 at 18). In addition, Defendants assert that they have conducted government-to-government consultation with GRIC on their specific concerns. (*Id.* at 20). Defendants therefore contend that on the record as a whole, they are entitled to summary judgment.

II. Standard of Review

Judicial review of the FHWA's and ADOT's (the "Agencies") actions under NEPA and Section 4(f) is governed by the Administrative Procedures Act ("APA"). *Earth Island Inst. v. U.S. Forest Service*, 697 F.3d 1010, 1013 (9th Cir. 2012); *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 625 F.3d 1092, 1109 (9th Cir. 2008). The APA provides in pertinent part that a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." or "(D) without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). "Review

under the arbitrary and capricious standard is narrow, and we do not substitute our judgment for that of the agency." *Earth Island Inst.*, 697 F.3d at 1013 (internal quotations and citations omitted). This highly deferential standard mandates that an agency's decision be set aside "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (citations and internal quotations omitted) (*overruled on other grounds by American Trucking Ass'ns Inc. v City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)). Therefore, "[t]he APA does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions about environmental impacts." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citations omitted). The agency action "need be only a reasonable, not the best or most reasonable, decision." *National Wildlife Federation v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

III. Discussion of Alleged NEPA Violations

NEPA "requires federal agencies to prepare an Environmental Impact Statement ("EIS") discussing, among other things, the environmental impact of a proposed action, and adverse environmental effects which cannot be avoided, and alternatives to the proposed action." *National Parks & Conservation Association v. Bureau of Land Management*, 606 F.3d 1058, 1069 (9th Cir. 2009) (citing 42 U.S.C. § 4332(2)(C)). "Publication of an EIS, both in draft and final form . . . gives the public the assurance that the agency has indeed considered environmental concerns in its decision making process . . . and, perhaps more significantly, provides a springboard for public comment." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (internal quotations and citations omitted). NEPA's "action-forcing" procedures require that agencies take a "hard look at environmental consequences" of their planned action. *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976)).

Plaintiffs raise multiple challenges to the Agencies' actions under NEPA. The

Court will address each in turn to determine whether Plaintiffs have met their burden to show the Agencies acted arbitrarily or capriciously.

A. Purpose and Need

An EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. "Agencies enjoy 'considerable discretion' to define the purpose and need of a project." *National Parks & Conservation Association*, 606 F.3d at 1070 (citing *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir. 1998)). An agency, however, "cannot define its objectives in unreasonably narrow terms." *City of Carmel-By-The-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997). "A purpose and need statement will fail if it unreasonably narrows the agency's consideration of alternatives so that the outcome is preordained." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013). Courts review a purpose and need statement for reasonableness. *Id.*

Here, the Court finds that the Agencies' discussion of purpose and need in the Final EIS ("FEIS") was reasonable and did not create a preordained outcome. Plaintiffs argue that the Agencies limited the stated purpose and need to include only a major transportation facility (a freeway) within the defined Study Area, thus predetermining the desired outcome. Plaintiffs further argue that the Agencies used the transportation planning process to circumvent the NEPA process, which is prohibited. They claim that the NEPA process was nothing more than a way to rationalize a decision that had already been made – to build the Loop 202 freeway. The Court disagrees.

As the Federal Defendants argue, even though the Freeway Project has been included in the Maricopa County Association of Governments ("MAG")[6] long range transportation plan since the 1980's, that in and of itself does not establish that the

[6] The Maricopa Association of Governments "is the state-federal metropolitan planning organization ("MPO") responsible for transportation planning in the Phoenix Metropolitan Area, and was responsible for generating the Long-Range Transportation Plan ("RTP")" for the area. (Doc. 108 at 4). Although not a county government, GRIC is an "active member of the [MAG] Regional Council . . ." (Doc. 108 at 8).

outcome of the Agencies' NEPA analysis was predetermined. Plaintiffs' argument seems to suggest that the Agencies should have disregarded the thirty-plus years of work done by MAG and began anew a comprehensive analysis of the area's transportation needs before completing the EIS. That, however, is not what the law requires and Plaintiffs have not demonstrated otherwise. To the contrary, federal law requires states to develop long-range transportation plans from which federally-funded highway and transit projects must flow.

"For 40 years, the Congress has directed that federally funded highway and transit projects must flow from metropolitan and statewide transportation planning processes (pursuant to 23 U.S.C. 134-135 and 49 U.S.C. 5303-5306)." 23 C.F.R. Pt. 450, App. A ("Linking the Transportation Planning and NEPA Processes"). "When the NEPA and transportation planning processes are not well coordinated, the NEPA process may lead to the development of information that is more appropriately developed in the planning process, resulting in duplication of work and delays in transportation improvements." *Id.* The purpose of the referenced Appendix is to change the culture of non-cooperation and insufficient coordination "by supporting congressional intent that statewide and metropolitan planning should be the foundation for highway and transit project decisions." *Id.* The Appendix contains a comprehensive discussion of the importance of utilizing the transportation planning process to inform the NEPA process. *See id.* The Appendix specifically addresses how transportation planning can be used to shape a project's purpose and need in the NEPA process and explains that "[a] sound transportation planning process is the primary source of the project purpose and need." 23 C.F.R. Pt. 450, App. A at II-8. The Court therefore finds that the Agencies' use of MAG's Regional Transportation Plan ("RTP") to develop the purpose and need of the proposed action (the Freeway Project) in the FEIS was not improper, was consistent with, and indeed mandated by, federal law.

The purpose and need discussion in Chapter 1 of the FEIS explains that the Freeway Project has been included in MAG's past and current regional transportation planning efforts. In light of that fact, the Agencies, as part of the EIS process,

reexamined whether there was still a need for the Freeway Project. The chapter includes a lengthy and elaborate discussion of the need for the proposed freeway based on (1) socioeconomic factors, including significant increases in population, housing units and employment between 2010 and 2035; and (2) regional transportation demand and existing and projected transportation system capacity deficiencies. The purpose of the proposed action is, therefore, to meet these identified needs. Based on their analysis of these socioeconomic and transportation conditions, the Agencies concluded that the need for the Freeway Project still exists and that without this project, the region's transportation network will suffer and congestion will worsen.

After review of the Agencies' purpose and need discussion, the Court finds that it was not impermissibly narrow such that it led to a predetermined outcome. The Agencies state that their use of the transportation process to inform the NEPA analysis was not improper and the Court agrees. The Agencies properly relied on information from the RTP to inform their discussion of the purpose and need in the FEIS. The Agencies' comprehensive discussion of socioeconomic and transportation demand factors supports their determination that a need for the proposed action still exists and demonstrates that their decision was not arbitrary. The purpose and need discussion is sufficiently broad to permit consideration of a reasonable range of alternatives, which are discussed below. Plaintiffs have therefore not met their burden to show that the purpose and need discussion was arbitrary and capricious and failed to comply with NEPA. For these reasons, the Court finds Defendants are entitled to summary judgment on this issue.

B. Consideration of Reasonable Alternatives

Plaintiffs further argue that the Agencies failed to consider a reasonable range of alternatives to the proposed action. NEPA requires agencies to include in an EIS, among other things, a discussion of alternatives to the proposed action. 42 U.S.C. § 4332(C)(iii); *HonoluluTraffic.com v. Federal Transit Administration*, 742 F.3d 1222, 1231 (9th Cir. 2014) (citing 42 U.S.C. § 4332). Consideration of alternatives "is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. "The 'rule of reason' guides both the choice of alternatives as well as the extent to which the Environmental Impact

Statement must discuss each alternative." *City of Carmel-By-The-Sea*, 123 F.3d at 1155 (citations omitted). "The Environmental Impact Statement need not consider an infinite range of alternatives, only reasonable or feasible ones." *Id.* (citing 40 C.F.R. § 1502.14(a)-(c). "An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." *Seattle Audubon Society v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996). Project alternatives derive from the purpose and need section of the EIS. *City of Carmel-By-The-Sea*, 123 F.3d at 1155.

Additionally, the Ninth Circuit has held "that an agency does not violate NEPA by refusing to discuss alternatives already rejected in prior state studies." *HonoluluTraffic.com*, 742 F.3d at 1231 (citing *Laguna Greenbelt, Inc. v. Dept. of Transportation*, 42 F.3d 517, 524, n. 6 (9th Cir. 1994)). "Under applicable federal regulations, a state-prepared [Alternatives Analysis ("AA")] may be used as part of the NEPA process as long as it meets certain requirements, including that (1) the federal lead agency furnished guidance in the AA's preparation and independently evaluation the document, 23 U.S.C. § 139(c)(3), and (2) the AA was conducted with public review and a reasonable opportunity to comment, 23 C.F.R. § 450.318(b)(2)(ii)-(iii)." *HonoluluTraffic.com*, 742 F.3d at 1231.

The Agencies state that as part of the NEPA process they established a Citizens Advisory Team ("SMCAT"), which included some of the PARC Plaintiffs, to provide input on the scope and content of the EIS. (Doc. 109 at 18). Plaintiffs claim they and others "submitted a significant number of reasonable alternatives for consideration during the NEPA process that should have been considered in the FEIS – none of which were studied in detail by Defendants." (Doc. 95 at 22). Plaintiffs argue that several reasonable alternatives were improperly rejected or inadequately considered. Among the alternatives that Plaintiffs claim should have been more closely considered were various hybrid alternatives, routes through GRIC land including Riggs Road and Queen Creek Road alternatives, a depressed freeway alternative, and the Interstate 8 – State Route 85 alternative. (Doc. 101-4 at 23-27).

Chapter 3 of the FEIS, entitled "Alternatives," is a 70-page discussion of the alternatives development and screening process, the post-screening alternatives that were studied in detail, and the identification of a preferred alternative. The alternatives chapter reiterates the significance of the purpose and need analysis from Chapter 1 and its relationship to the development of alternatives. It explains that in 2013, MAG approved new socioeconomic projections for Maricopa County regarding population, employment and housing, and corresponding projections related to regional traffic demands. Because much of the projected growth is expected to occur in areas that would be served by a freeway in the Study Area, the Agencies determined that the new projections, along with current deficiencies in transportation system capacity, continue to demonstrate a need for the proposed action.

Based on the identified needs, the Agencies used a process to develop a range of alternatives, screen the alternatives, and identify the ones to be studied in detail in the EIS. Chapter 3 describes at length the development of alternatives and the screening process. Here, the alternatives considered included numerous non-freeway alternatives to improve transportation conditions in the Study Area, including 1) maximizing the efficiency of existing freeways, 2) reducing demand on existing freeways, 3) transit alternatives including light rail, commuter rail and bus routes, 4) arterial street expansion, and 5) land use alternatives such as increasing residential densities and redistributing employment centers. Other freeway alternatives were also considered in the screening process.

Through a multi-step screening process, the Agencies evaluated the various alternatives, eliminating some from further consideration while carrying others forward to the next step. Throughout the screening process, the Agencies considered whether the alternatives would satisfy the purpose and need of the proposed action. After the screening process was completed, five alternatives for the Western Section, one for the Eastern Section, and a No-Action alternative remained and were evaluated in detail in the DEIS and FEIS.

The Agencies explain that at the urging of the SMCAT, they pursued an

alternative alignment on GRIC land. (Doc. 109 at 18). As part of this process, the Agencies engaged GRIC in discussions about the possibility of studying an alternative to build on GRIC land. (FAR00001241-44; FAR00001243-44). Ultimately, in 2000, the GRIC Council ratified a resolution opposing any alignment on GRIC land and that decision was reaffirmed in 2005. (Doc. 109 at 20). As a result, the Agencies were not permitted to study alternatives on GRIC land. (FAR00000046-47; FAR00001247-48). Thus, the Agencies no longer considered this SMCAT proposal as a viable alternative.

Upon close review of the Agencies' alternatives evaluation process and analysis, the Court finds that Plaintiffs have failed to demonstrate that the Agencies' consideration of alternatives was arbitrary and capricious. To the contrary, the discussion in Chapter 3 of the Agencies' analysis of alternatives demonstrates that extensive work was performed to develop reasonable alternatives, thoroughly screen the alternatives, and more fully study those that survived the screening process. The discussion further reflects that the numerous alternatives evaluated were derived from the identified socioeconomic factors and resulting transportation needs addressed in the purpose and need chapter. The Court agrees with the Federal Defendants' assertion that "[t]he Agencies undertook a systematic, interdisciplinary approach to ensure integrated and balanced consideration of a diverse set of factors, including ability to meet the need for the project, design and operational parameters, impacts on the natural and human environments, conceptual level cost comparisons, and public and political acceptability." (Doc. 109 at 32-33). Thus, the Court finds little support for Plaintiffs' argument that the range of alternatives considered was insufficient due to a narrowly stated purpose and need. Nor is the Court persuaded that any other alleged deficiencies in the alternatives analysis asserted by Plaintiffs rise to the level of being arbitrary and capricious. For these reasons, the Court finds Defendants are entitled to summary judgment on this issue.

C. No Build Alternative

Plaintiffs contend that the Agencies' analysis of the no-build alternative violated NEPA because the Agencies failed "to use non-build data when evaluating the no build alternative." (Doc. 97 at 38). They claim the Agencies "utilized a

socioeconomic/demographic model to analyze the impacts of the No Action Alternative that assumed construction of the Freeway." (Doc. 95 at 23). Plaintiffs claim that by assuming the same employment and population growth would occur in the Study Area with or without the Freeway Project, the Agencies' comparison of the no-build alternative with the preferred alternative (the Freeway Project) was flawed. Plaintiffs further point out that the Environmental Protection Agency identified this alleged deficiency in its comments to the DEIS and FEIS.

The Agencies, however, argue that it was reasonable to rely on the same MAG-approved socioeconomic projections to evaluate both the no-build alternative and the preferred alternative. The Agencies disagree with Plaintiffs' assumption that the level of growth in the area of the Freeway Project will be less if the freeway is not built, noting that Plaintiffs cite no evidence to support their assumption. (Doc. 109 at 35; Doc. 104 at 25). The Agencies claim they "reasonably assumed that the socioeconomic projections provided by MAG reflecting the continued conversion of undeveloped and agricultural land to developed uses would continue consistent with the recent trends" whether or not the freeway is built. (Doc. 104 at 25).

The Agencies rely on the Ninth Circuit's decision in *Laguna Greenbelt, Inc. v. U.S. Dept. of Transportation*, 42 F.3d 517 (9th Cir. 1994) to support their position. In that case, the Court held that the Federal Highway Administration's evaluation of the no-build alternative did not violate NEPA even though it relied on socioeconomic projections that assumed the proposed toll road would be built. *Laguna Greenbelt*, 42 F.3d at 526-527. The Court found that the EIS provided support for its conclusion that growth in the area served by the toll road would be the same regardless of whether the toll road was built because "98.5% of all land in the project's 'area of benefit' is already accounted for by either existing or committed land uses not contingent on construction of the corridor." *Id.* at 525. The Court further explained that "[t]he need for the corridor is based on existing as well as future traffic congestion . . . and the county's population probably will grow in the coming years even without the corridor." *Id.* at 526-527.

The Court agrees with Defendants that *Laguna Greenbelt* is applicable here and,

as it must, will apply it as precedent. As in *Laguna Greenbelt*, the need for the Freeway Project, as set forth in Chapter 1 of the FEIS, is to alleviate existing congestion in addition to future congestion resulting from projected growth. As the Agencies found in their 2012 assessment of traffic conditions, the regional transportation system current capacity is meeting only 84 percent of existing travel demand. (Doc. 104 at 25).

Additionally, growth in the Study Area is expected to continue with or without the Freeway Project. As the Federal Defendants point out, "[f]rom 2000-2010, the population in the Study Area census blocks increased by more than 72 percent." (Doc. 104 at 26). Despite projected growth at a lower rate than in the past, the Agencies reasonably concluded for purposes of evaluating the no-build alternative that such growth and development activities would occur in accordance with recent trends even in the absence of the Freeway Project.

Though less developed than the area at issue in *Laguna Greenbelt*, the Study Area here, except certain areas of GRIC, is highly developed. The Study Area is therefore not dependent on the Freeway Project to induce growth. To the contrary, the administrative record shows that significant rates of growth up to this point have occurred without the Freeway Project and there is nothing in that record to show that projected growth and further development would not occur in the absence of the Freeway Project. For these reasons, the Court finds that the Agencies' reliance on the same socioeconomic projections to evaluate the no-build alternative that were used to evaluate the preferred alternative was not arbitrary and capricious. The Agencies' use of the projections was reasonable under the circumstances here. Defendants are therefore entitled to summary judgment on this issue.

D. Analysis of Impacts

NEPA's procedures are in place to ensure "that agencies take a hard look at environmental consequences" before deciding whether to proceed with a proposed action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotations and citations omitted). NEPA "does not mandate particular results, but simply prescribes the necessary process." *Id.* "NEPA regulations and case law require

disclosure of all foreseeable direct and indirect impacts." *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 963 (9th Cir. 2002) (citing 40 C.F.R. § 1502.16 and *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975)).

Plaintiffs contend that the Agencies failed to consider numerous significant impacts associated with the Freeway Project. Plaintiff GRIC argues that the Agencies failed to adequately analyze specific impacts on the Community and its members. The PARC Plaintiffs claim that the Agencies failed to adequately consider three significant impacts: 1) the impacts on children's health, 2) the impacts of mobile source air toxic (MSAT) emissions and trucks, and 3) the impacts associated with the transportation of hazardous materials on the freeway.

1. Impacts on GRIC

GRIC argues that the Agencies were required to analyze impacts of the Freeway Project specifically affecting the Community and its members, separate and apart from the impacts to the Study Area generally. GRIC claims that by failing to separately address the impacts to the Community, the EIS is insufficient. GRIC identifies several impacts to the Community that it alleges the Agencies failed to properly consider.

With respect to the impacts to the entire Study Area regarding air quality and transportation of hazardous materials that GRIC claims should have been analyzed separately, GRIC has failed to demonstrate how the Agencies' analysis of these environmental impacts does not equally apply to the Community and its members. GRIC has not shown that these impacts are unique to, or disproportionately affect, the Community such that they require separate consideration and analysis in the EIS. As the Federal Defendants explain, "[t]he Agencies evaluated the Project's potential impacts within, and in some cases beyond, the Study Area, which specifically includes abutting Community land." (Doc. 104 at 39). The evaluation did not differentiate between populations in the Study Area, and it is Plaintiffs' burden to show how and why the analysis of these impacts should have differentiated between GRIC members and the population in general in the Study Area. GRIC has not done so. Thus, with respect to the Agencies' discussion of impacts regarding air quality and transportation of hazardous

materials, the Court finds nothing deficient about their inclusion of GRIC lands in that discussion.

With regard to other impacts raised by GRIC, on this record, the Court cannot find that "the Agencies overlooked the harm to the Community and brushed aside its concerns in approving the project." (Doc. 97 at 33). The Agencies explain, for example, that between 2001 and 2009 they conducted over 100 meetings with GRIC and that they considered multiple concerns regarding the Freeway Project on and off of GRIC land. (Doc. 109 at 20). The Court has reviewed the chapters in the EIS that discuss the project's impacts and the Court agrees with the Agencies that they did in fact evaluate the environmental impacts on GRIC. As the Federal Defendants explain, the Agencies evaluated impacts to GRIC in the FEIS with respect to social conditions, environmental justice, displacement and relocations, air quality and noise among other several other impacts. (Doc. 103 at 12).

Moreover, GRIC's argument on the Agencies' alleged failures to evaluate impacts on the Community and its members is comprised of one conclusory sentence for each alleged "improper action." (Doc. 97 at 33-34). For example, GRIC argues that the Agencies limited their consideration of impacts on neighborhoods to the area immediately north of Pecos Road and failed to consider such impacts on Community land south of Pecos Road. (Doc. 97 at 33). The Court, however, agrees with the Federal Defendants that GRIC took this isolated statement out of context. The statement comes from Chapter 3 of the FEIS in which exclusion of alternatives is being discussed, not evaluation of impacts. The Agencies were explaining that other Eastern Section alternatives, such as Ray Road and Chandler Blvd., were eliminated because of the substantial impacts on existing residences and disruption to community character and cohesion in the areas where these alternative routes were located, which are north of Pecos Road. (FAR00006547). By contrast, the Agencies found that the preferred Eastern Section alternative would not cause the same level of disruption to that area. Thus, the purpose of the discussion was not to identify impacts of the preferred alternative north of Pecos Road to the exclusion of impacts south of Pecos Road, as

GRIC contends. Rather, the Agencies' intended to explain how the impact on residential neighborhoods would be reduced with the preferred alternative route (along Pecos Road).

Additionally, in their evaluation of Impacts on Community Character and Cohesion in Chapter 4 of the FEIS, the Agencies noted that while established residential communities exist north of Pecos Road, GRIC land to the south of Pecos Road is primarily vacant or used for agriculture. It is therefore reasonable that the Agencies' evaluation of impacts on neighborhoods would be focused on the sections of the Study Area where residential neighborhoods exist.

After review of GRIC's arguments about the Agencies' alleged failures to consider the impacts of the Freeway Project on the Community and its members, and the Agencies' responses showing in the record how they, in fact, did consider and discuss impacts to the Community, the Court finds in favor of the Agencies on this issue. GRIC has not demonstrated that the Agencies acted in an arbitrary and manner in how they addressed the impacts of the Freeway Project on the Community.

2. Impacts on Children's Health

Plaintiffs next contend that the Agencies failed to adequately consider impacts on children's health. Plaintiffs argue that this failure violates the Agencies' obligations under NEPA and is contrary to Executive Order 13045 on Children's Health and Safety. Plaintiffs further explain that the EPA, in its comments on the FEIS, expressed criticism of the Agencies' conclusion that children are inherently accounted for in the analysis conducted for the population as a whole.

In response, the Agencies assert that they "specifically considered and addressed the potential air quality impacts of the highway, including the potential for impacts on children." (Doc. 104 at 31). They explain that they performed the conformity analyses called for by the Clean Air Act, 42 U.S.C. § 7506(c), which requires the FHWA to demonstrate that a given transportation project satisfies the State's implementation plan for achieving compliance with the National Ambient Air Quality Standards ("NAAQS") for various pollutants. They also analyzed mobile source air toxics ("MSATs"), which are specific toxic pollutants associated with vehicle emissions, even though the EPA has

not set NAAQS for MSATs. Defendants explain that these analyses "demonstrated that the highway would not cause any violations or delay in attainment of the NAAQS, and that exposure to MSATs would not only significantly decrease in the Study Area during the life of the Project, but would not be significantly different between the No-Build and build alternatives." (Doc. 104 at 31).

The Agencies further explain that the NAAQS are set at levels designed to protect sensitive populations, including children. The areas where the analyses were conducted are areas where both children and adults are located, including areas with schools, day care centers, homes and businesses. Thus, according to the Agencies, their analyses show that, by complying with the NAAQS, the Freeway Project will not disproportionately affect children's health.

Plaintiffs do not dispute the results of the Agencies' air quality testing. Nor do they dispute that the EPA-established NAAQS are designed to protect sensitive populations, including children. The Court therefore finds that the Agencies did not act arbitrarily or capriciously by conducting their analyses of the potential air quality impacts of the Freeway Project on all populations, including children.

Even though the EPA in its comments to the FEIS claims that the Agencies' inclusion of children in the overall analyses does not meet the intent of Executive Order 13045 regarding children's health, nothing presented by Plaintiffs establishes a violation of NEPA. Plaintiffs' reliance on the Executive Order is unavailing given that it does not create substantive or procedural enforceable rights at law or equity. *See* Exec. Order No. 13045 Sec. 7 (1997). Moreover, tellingly, where Plaintiffs assert that the Agencies' failure to adequately address potential health impacts on children is a violation of NEPA, they cite no legal authority. (Doc. 95 at 31; Doc. 113 at 33). The Federal Defendants, on the other hand, cite two circuit court decisions and one district court decision, albeit outside of this circuit, for the proposition that NEPA's requirements are per se satisfied by showing compliance with NAAQS. (Doc. 104 at 32). Given the Ninth Circuit's reliance on the Third Circuit case, *Tinicum Township, Pa. v. U.S. Dept. of Transp.*, 685

F.3d 288, 294 (3d Cir. 2012)[7], this Court is persuaded. These cases indicate that agency compliance with lead agency regulations, such as the NAAQS, is reasonable. For the foregoing reasons, the Court finds in favor of Defendants on this issue.

3. Impacts of MSATs and Trucks

Plaintiffs next claim that the FEIS failed to adequately consider the impacts of MSATs and trucks. Regarding MSATs, Plaintiffs argue that the Agencies failed to analyze near-roadway MSAT emissions and instead estimated the value of such emissions in the broader Study Area. Plaintiffs contend this violated NEPA. In addition, Plaintiffs argue that the Agencies violated NEPA by failing to provide a proper estimate of truck traffic, thus making it impossible to accurately assess the level of pollutants emitted by trucks.

In response, the Agencies explain that they relied on EPA's latest model for estimating MSAT emissions. That analysis showed that emissions in the Study Area overall would be significantly reduced whether a build alternative or the No-Action alternative was selected. The analysis presented in the FEIS showed that an 84 percent reduction of MSAT emissions would occur in the Study Area even if a build alternative was selected, and only a slightly larger reduction would occur under the No-Action alternative. The Agencies explain that, as noted above, the EPA has not provided MSAT emission thresholds for MSATs that indicate what levels are safe or unsafe. As a result, even if the Agencies had conducted a corridor analysis as suggested by the EPA, they would have no emission thresholds against which to compare their results.

The Agencies also take issue with GRIC's contention that they must have had, but did not provide, data regarding near-roadway MSAT emissions in order to calculate the total emissions from the Study Area. The Agencies assert that "[t]he model used to conduct the MSAT analysis uses distributions of vehicle travel across the entire roadway network of an area to model emissions for the roadway network as a whole; therefore, it is not possible to identify emission levels from one particular road within the entire

[7] *See California ex rel. Imperial County Air Pollution Control Dist. v. U.S. Dept. of the Interior*, 767 F.3d 781, 799 (9th Cir. 2014).

network." (Doc. 104 at 35). GRIC does not challenge this explanation in its Reply.

Based on the Court's review of the Agencies' analysis of the impact of MSATs, the Court finds no support to show they acted arbitrarily and capriciously. In response to EPA's concerns, the Agencies provided reasonable grounds for their determination that an MSAT health risk assessment along the corridor was unnecessary here. (*See* Doc. 105 at ¶¶ 81-83). The absence of any emission thresholds and the projected significant reduction in MSAT emissions over the life of the project are among those grounds. Plaintiffs have not shown that the Agencies' analysis of this issue violated NEPA.

Similarly, with respect to Plaintiffs' challenge to the Agencies' truck traffic estimates, the Court finds no violation of NEPA. The Agencies explain that the average estimate of ten percent represents the entire corridor "and is in alignment with the ten percent average on other freeways, and the national average of seven percent." (Doc. 104 at 35). The Agencies further explain that comparing "the traffic on Interstate 10 near the proposed action, trucks comprise approximately eight percent of the traffic during the peak hours and fifteen percent in the off hours." (*Id.*). The ten percent approximation "was further verified by comparing the Interstate-10 percentages derived in the MAG Heavy Truck studies with actual truck counts for Interstate-10." (*Id.*). Plaintiffs have failed to demonstrate how the Agencies' approximation of truck traffic is a violation of NEPA. The Court therefore finds in favor of the Agencies on the MSAT and truck traffic issues.

4. Impacts Associated with Hazardous Materials Transportation

The final impact-related issue raised by Plaintiffs is that the Agencies failed to consider impacts associated with the transportation of hazardous materials. Plaintiffs argue that given the number of trucks that would use the new freeway, and the likelihood that some may be carrying hazardous materials, an analysis of the impact of trucks carrying hazardous materials should have been completed in the EIS.

The Agencies respond by asserting that they did in fact consider the issue of transporting hazardous materials on the freeway, but concluded that an environmental analysis was not required in light of the speculative nature of a hazardous materials

incident. They explain that any vehicle carrying cargo must comply with U.S. Department of Transportation regulations, and that ADOT can designate restrictions regarding transportation of hazardous materials based on emergency response factors or roadway design limitations for specific segments of the freeway. In addition, they explain the process that occurs if a hazardous materials incident occurs on a state or federal highway. (Doc. 103 at 11).

The Agencies argue that they are required only to "examine the 'reasonably foreseeable' environmental effects of their proposed actions when conducting environmental review." *Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy*, 383 F.3d 1082, 1089 (9th Cir. 2004) (citing 40 C.F.R. §§ 1502.16, 1508.8(b)). The Ninth Circuit has "rejected the notion that every conceivable environmental impact must be discussed in an EIS." *Id.* (citation and internal quotations omitted).

The Court finds that Plaintiffs have not shown the Agencies' determination regarding this issue to be arbitrary and capricious. It was reasonable for the Agencies to conclude that the releases of hazardous chemicals resulting from a transportation incident are not reasonably foreseeable and, consequently, a discussion of the potential impacts was not required. The reasonableness of the Agencies' conclusion is bolstered by the fact that there are no requirements in the relevant provisions of the CFR or the FHWA's advisory guidelines "to address releases of hazardous chemicals resulting from a transportation incident in [NEPA] documents for transportation projects such as the South Mountain Freeway." (Doc. 103 at 12). The Court therefore finds in favor of the Agencies on this issue.

E. Mitigation Measures

Plaintiffs argue that the Agencies failed to adequately discuss mitigation measures. Plaintiffs contend that the Agencies did not provide a reasoned discussion of mitigation measures and mostly provided a mere listing of such measures. Plaintiffs further claim that the Agencies' failure to adequately address mitigation is likely a result of an insufficient level of freeway design during the NEPA process. In addition, Plaintiffs specifically claim the Agencies failed to discuss mitigation measures for cumulative and

secondary impacts, and for wildlife corridors and connectivity.

The Agencies respond that their discussion of mitigation measures in the DEIS, FEIS and Record of Decision ("ROD") is sufficient. The Agencies argue that Plaintiffs cite to a table of the Freeway Project's mitigation commitments, which is a summary, but fail to acknowledge that in Chapter 4 of the FEIS, "mitigation measures were discussed in the context of every resource that was evaluated." (Doc. 104 at 37). With respect to the alleged insufficient level of design, the Agencies contend that the 15% level reflected in the FEIS and DEIS "is the result of federal law, which prohibits FHWA from conducting detailed project design plans prior to approval of the FEIS." (Doc. 109 at 39) (citing 23 U.S.C. § 112). The Agencies further argue that mitigation measures for secondary and cumulative impacts, as well as for potential impacts on wildlife habitats are sufficiently addressed.

"[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences." *Robertson*, 490 U.S. at 351; *see also* 40 C.F.R. §§ 1502.14(f), 1502.16(h). Exclusion of "a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA." *Id.* at 352. "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998) (internal quotations and citations omitted). "There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other." *Robertson*, 490 U.S. at 352. "NEPA does not require a fully developed plan that will mitigate all environmental harm before an agency can act; NEPA requires only that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fully evaluated." *Laguna Greenbelt*, 42 F.3d at 528.

First, as noted, Plaintiffs claim the Agencies failed to provide a sufficient level of project design during the NEPA process which affected their ability to adequately address

mitigation. Plaintiffs argue that assuming the Freeway Project was "designed to a 15% level during the NEPA process, this would not allow for development of the mitigation required by law – as is evident from the EIS/ROD." (Doc. 95 at 37). At oral argument, counsel for the PARC Plaintiffs urged the Court that:

> You need a greater level of design than 15 percent. Whatever that number is, I don't know, but I can guarantee you that it would be at least 50, 60 percent design level if you're going to be able to fully analyze mitigation measures and if, as required by law, you're conducting all possible planning to minimize harm.

(Doc. 129 at 29).[8] Counsel cited no authority for his assertion that at least a 50 to 60 percent design level is required to properly analyze mitigation measures.

The Agencies contend that pursuant to 23 U.S.C. § 112, they are prohibited from conducting detailed project design plans before complying with NEPA. Indeed, the referenced statute provides that "[a] contracting agency shall not proceed . . . with final design or construction until completion of" the NEPA process. 23 U.S.C. § 112(b)(C)(iii). Prior to the completion of the NEPA process, a contracting agency is limited to proceeding with a "preliminary design and any work related to preliminary design . . . ." 23 U.S.C. § 112(b)(C)(i)(III).

At oral argument, counsel for the Federal Defendants explained that "the 15 percent plan doesn't mean that we've only designed 15 percent of a freeway." (Doc. 129 at 99). Counsel presented slides from the administrative record showing the level of detail in the 15 percent plan, asserting that "these engineering plans are quite a bit more detailed than 15 percent sort of to a layperson might suggest." (*Id.*). Counsel further asserted that although a 15 percent design plan may not sound like much to a layperson, "to an engineer, this provides more than enough information to make the determinations that are required under NEPA." (Doc. 129 at 100).

---

[8] Although the PARC Plaintiffs' counsel referenced Section 4(f) before making this specific comment, in the prior paragraph he challenged the low level of design to criticize the Agencies' mitigation analysis under NEPA. (Doc. 129 at 29). The parties' discussion of the level of design is relevant to both the NEPA and Section 4(f) analyses.

While the Court does not consider counsel's statements as evidence, the Court finds that Plaintiffs have not demonstrated that the 15% design level utilized for completing the NEPA process was per se deficient as they argue. Although the PARC Plaintiffs' counsel insisted to the Court that at least a 50 to 60 percent level of design is required for the mitigation analysis to have any real meaning, he cited no authority for his claim. Nor did Plaintiffs cite any authority in their papers for their contention that a 15% design plan is insufficient. Moreover, as the law requires, this Court will not second-guess the Agencies' decision so long as there is adequate support in the record for that decision. *See Lands Council*, 537 F.3d at 993 (citations omitted). Plaintiffs have therefore not shown that the Agencies' use of 15% design plan for conducting its mitigation analysis was arbitrary and capricious.

Second, Plaintiffs argue that the Agencies' mitigation analysis overall was insufficient because it consists of a mere listing of mitigation measures that are proposed to occur in the future. They contend, therefore, that the Agencies failed to meet NEPA standards for discussion of mitigation measures.

As noted, Defendants respond that the listing Plaintiffs are referring to is a ten-page summary table in the ROD entitled "Commitments and Mitigation Measures." (FAR00000048-00000057). They contend that Plaintiffs ignore the discussion in Chapter 4 of the FEIS where "mitigation measures were discussed in the context of every resource that was evaluated." (Doc. 104 at 37). The Agencies claim that these discussions fulfill their obligations under NEPA.

The Court has reviewed Chapter 4 of the FEIS, entitled "Affected Environment, Environmental Consequences, and Mitigation," and finds that Plaintiffs have not shown the Agencies failed to include a reasonably complete discussion of possible mitigation measures. The Agencies' discussions in Chapter 4 of various environmental consequences of the proposed action include sufficient discussions of mitigation measures. Similarly, Chapter 5, entitled "Section 4(f) Evaluation," includes several detailed discussions of "Measures to Minimize Harm."

For example, one of the environmental consequences discussed in Chapter 4 that

would result from construction of the new freeway is displacement of households, businesses, and public facilities. (FAR00001365-00001373). The Agencies' discussion of displacement includes an examination of mitigation measures, such as land acquisition and relocation assistance in accordance with the Uniform Relocation Act, 42 U.S.C. §§ 4601, *et seq*, advisory services for displaced residents and business owners, rental assistance for eligible individuals, and replacement housing, among other measures. (FAR00001370-00001373). Likewise in Chapter 5, the Agencies include a substantial discussion of measures intended to minimized harm to SMPP from the proposed action, as required by Section 4(f). (FAR00001534-1541). Although these examples represent only a very small portion of the mitigation measures discussed in Chapters 4 and 5, they undermine Plaintiffs' argument that the Agencies' discussion of mitigation measures is limited to a listing of proposed prospective mitigation measures. *See Robertson*, 490 U.S. at 352 (explaining that there is no substantive requirement that a complete mitigation plan be actually formulated and adopted).

Other than Plaintiffs' specific identification of mitigation measures for cumulative and secondary impacts and for wildlife corridors, which the Court considers below, Plaintiffs urge the Court to find that the Agencies' discussion of mitigation measures was generally deficient. Plaintiffs' argument lacks sufficient detail. They broadly argue that the Agencies' discussions of mitigation measures fail to satisfy NEPA standards. Based on the Court's review of those discussions the Court finds Plaintiffs have not made the requisite showing of non-compliance with NEPA's mitigation requirements.

Third, regarding Plaintiffs' specific challenge to the Agencies' secondary and cumulative impacts, Plaintiffs reference a statement in the FEIS that "[d]isclosure of secondary and cumulative impacts does not require ADOT to propose and implement mitigation measures to address such impacts. . ." (Doc. 95 at 37). Plaintiffs contend that this assertion is directly contrary to the Agencies' obligation to consider mitigation of environmental impacts.

In response, however, the Agencies argue that "the FEIS went on to explain that '[p]roject-specific mitigation measures as proposed to address direct impacts inherently

address reductions in such overall impacts as well.'" (Doc. 104 at 37). They explain that by developing extensive mitigation measures intended to reduce the direct impacts of the Freeway Project, the indirect and cumulative impacts are also necessarily reduced. They point out that Plaintiffs cite no legal authority "requiring the Agencies to incorporate separate mitigation measures for indirect and cumulative effects." (Doc. 104 at 37-38). They claim that Plaintiffs are conflating NEPA's requirement to evaluate indirect and cumulative impacts with the requirement to develop mitigation measures, which is unsupported by law.

Plaintiffs did not directly address this issue in the discussion of mitigation measures in their Reply. (Doc. 113 at 35-39). Nor did Plaintiffs' counsel raise the issue of mitigation measures directed at secondary and cumulative impacts during oral argument. Absent legal authority demonstrating that the Agencies were required to separately develop mitigation measures for indirect and cumulative impacts associated with the Freeway Project, the Court finds Plaintiffs have not shown the Agencies failed to comply with NEPA on this issue.

For their fourth and final challenge to the Agencies' discussion of mitigation measures, Plaintiffs argue that the Agencies failed to adequately discuss mitigation measures for wildlife connectivity. Plaintiffs contend that the Agencies "improperly defer any substantive discussion of mitigation of wildlife corridors/connectivity for some later date. . ." (Doc. 95 at 39). Plaintiffs cited criticism from the EPA and the Arizona Game and Fish Department with regard to the Agencies' response to wildlife connectivity issues.

The Agencies counter that "the FEIS identifies appropriate mitigation measures related to wildlife connectivity and corridor impacts, and includes a reasonable level of discussion about those mitigation measures within the context of the impacts they address." (Doc. 109 at 43). They further argue that they have disclosed the potential impacts associated with wildlife movement and have proposed mitigation measures to minimize those impacts, which is all that NEPA requires.

Chapter 4 of the FEIS contains a lengthy discussion of the project's impact on

biological resources, including wildlife. (FAR00001444-00001458). The Agencies recognize that the Freeway Project will affect wildlife and cause habitat fragmentation. The FEIS provides an inventory of wildlife in the project area that was developed by Defendants in conjunction with federal and state agencies, among others. The Biological Evaluation for the proposed area was also revised to note GRIC's particular concerns for wetlands, plant and animal species. Moreover, the FEIS discusses, in detail, the potential impact on particular species in Western and Eastern study areas, including the Sonoran desert tortoise and the Tucson shovel-nosed snake.[9] In discussing mitigation of the fragmenting effect on these and other wildlife, the Agencies explain that the project will be designed to protect and maintain opportunities for wildlife connectivity between the South Mountains, GRIC land and the Sierra Estrella by enhancing bridges and drainage structures. (Doc. 104 at 38). The FEIS identifies several mitigation measures to be implemented during the design phase to protect wildlife habitats and facilitate wildlife movement. (FAR00001457).

Based on the Court's review of the Agencies' discussion of impacts to wildlife, and specifically to wildlife connectivity, and the Agencies' discussion of mitigation measures to reduce those impacts, the Court finds Plaintiffs have not demonstrated that the Agencies failed to comply with NEPA. The Court therefore finds that none of Plaintiffs' challenges to the Agencies' discussion of mitigation measures establish that the Agencies acted in an arbitrary and capricious manner. As a result, The Court finds the Agencies are entitled to summary judgment on this issue.

IV. Discussion of Alleged Rule 4(f) Violations

Unlike NEPA, which sets forth procedural requirements, Section 4(f) of the Department of Transportation Act imposes a substantive mandate on an agency's actions. *North Idaho Community Action Network v. U.S. Dept. of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008). Section 4(f) allows a transportation project "requiring the use of publicly

[9] The FEIS also incorporates reference to State and Federal laws protecting certain affected species, such as the Bald and Golden eagle, and notes that compliance with such laws offers additional protections for those species.

owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance, or land of an historic site of national, State, or local significance . . . only if – (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historical site resulting from the use." 49 U.S.C. § 303(c). These conditions reinforce "the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." 49 U.S.C. § 303(a).

"An alternative is not feasible if it cannot be built as a matter of sound engineering judgment." 23 C.F.R. § 774.17. "An alternative is not prudent if, among other things, it 'compromises the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need.'" *HonoluluTraffic.com*, 742 F.3d at 1232 (quoting 23 C.F.R. § 774.17). An agency's Section 4(f) evaluation "shall include sufficient supporting documentation to demonstrate why there is no feasible and prudent avoidance alternative and shall summarize the results of all possible planning to minimize harm to the Section 4(f) property." 23 C.F.R. § 774.7(a).

As referenced above, upon review, the Court considers whether the Agencies' decision to use Section 4(f) property was "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (quoting 5 U.S.C. § 706(2)(A)). In doing so, the Court examines whether the Agencies could have reasonably believed that there were no feasible and prudent alternatives to using Section 4(f) property. *Overton Park*, 401 U.S. at 416. In addition, the Court must decide "whether the Secretary acted within the scope of his [or her] authority" and "whether the Secretary's action followed the necessary procedural requirements." *Id.* at 415, 417.

Plaintiffs argue that the Agencies' Section 4(f) analysis on the impacts to South Mountain was inadequate as a matter of law. Plaintiffs claim the Agencies failed to consider feasible and prudent alternatives that could have avoided SMPP, and that they

failed to conduct all possible planning to minimize harm to SMPP.

The Agencies argue, on the other hand, that they complied with Section 4(f). They contend that in Chapter 5 of the FEIS "and in the extensive supporting documentation in the Administrative Record, the Agencies identified the Section 4(f) properties in the Project area, re-designed alternatives to avoid the Section 4(f) properties in every instance but one (SMPP), found that the avoidance alternatives to using SMPP were not prudent and feasible, adopted a variety of measures to minimize harm to SMPP, and provided an opportunity for public, agency, and tribal review of the evaluation." (Doc. 104 at 41).

A. Feasible and Prudent Alternatives

Plaintiffs argue that Defendants failed to consider feasible and prudent alternatives that could have avoided SMPP. Plaintiffs contend there are a number of such alternatives, including some that are not on GRIC land, that Defendants failed to properly consider. According to Plaintiffs, those alternatives are: "(i) the no-action alternative; (ii) all action alternatives north of South Mountain; (iii) all action alternatives south of Community land; (iv) the U.S. 60 Extension alternative; (v) the Riggs Road alternative; (vi) the SR 85/I-8 alternative; and (vii) rail options, bus routes and arterial street improvement." (Doc. 97 at 32).

Chapter 5 of the FEIS, entitled "Section 4(f) Evaluation," contains a comprehensive discussion of how the Freeway Project would affect SMPP, the avoidance alternatives considered, and measures to minimize harm to SMPP. The Agencies assert therein that "[a]lternatives to avoid use of SMPP were evaluated and determined to be not prudent and feasible." (FAR00001537). Contrary to Plaintiffs' contention, the Agencies considered the alternatives identified above.

With regard to the No-Action alternative, the Agencies determined it would not meet the project's purpose and need and, as a result, it was not prudent. The Court finds no error in the Agencies' rejection of the No-Action alternative based on its failure to meet the project's purpose and need. The Court previously rejected Plaintiffs' argument that the project's "purpose and need" discussion was unduly restrictive and caused a

preordained outcome. Without fully repeating that discussion here, the Court explained that the Agencies found a need for the proposed freeway based on (1) socioeconomic factors, including significant increases in population, housing units and employment between 2010 and 2035; and (2) regional transportation demand and existing and projected transportation system capacity deficiencies, and that the purpose of the proposed action was to meet these needs. Thus, although the No-Action alternative would avoid SMPP, it would not accommodate the socioeconomic factors or the current and projected transportation system deficiencies. Plaintiffs have not shown that the Agencies' rejection of the No-Action alternative as imprudent under Section 4(f) was arbitrary and capricious.

Nor have Plaintiffs met their burden with regard to the other alternatives that they claim the Agencies failed to properly consider. The Agencies rejected the Riggs Road alternative because nearly two-thirds of it would be on GRIC land which, as noted above, GRIC would not allow. In addition, the Agencies determined the Riggs Road alternative would not be feasible and prudent because it would not meet the proposed action's purpose and need. Thus, although an alternative freeway alignment on GRIC land may have avoided SMPP, the Agencies determined it was not feasible in light of the Community's decision to prohibit such an alignment. Plaintiffs have not demonstrated that determination was arbitrary and capricious.

With regard to all action alternatives south of GRIC land, including the SR 85/I-8 alternative, Plaintiffs have not shown these to be feasible and prudent alternatives. The Agencies determined that the distance from downtown Phoenix of the SR85/I-8 alternative renders it not feasible and prudent. That alternative route would begin approximately 32 miles west of downtown Phoenix and would reconnect to I-10 at Casa Grande, approximately 56 miles south of downtown Phoenix. (FAR00001529). Thus, this alternative would likely have little impact on the current and projected future transportation system deficiencies in the Study Area. Other alternatives south of GRIC land would have similar shortcomings. Plaintiffs have not demonstrated that the Agencies' determination with respect to these alternatives was arbitrary and capricious.

Likewise, with regard to alternatives north of South Mountain, including US 60 extension to 1-10, US 60 extension to I-17, and I-10 spur, the Agencies determined that these alternatives would not meet the project's purpose and need. In addition, the Agencies determined that the alternatives north of South Mountain would have significant adverse impacts on portions of I-10, US 60 and SR 101L, and would cause underuse of SR 202L. (FAR00001529). Further, alternatives north of South Mountain would cause extensive residential and business displacements without addressing regional travel demand and current and projected system deficiencies. (*Id.*). Plaintiffs have not demonstrated to this Court that the Agencies acted arbitrarily and capriciously in concluding that alternatives north of South Mountain are not feasible and prudent under Section 4(f).

Finally, with regard to rail options, bus routes and arterial street improvement, although not specifically addressed in Chapter 5, the Agencies considered these alternatives in Chapter 3 and concluded they do not satisfy the project's purpose and need. Plaintiffs have not demonstrated that these are feasible and prudent alternatives under Section 4(f). Based on its review, the Court finds the Agencies acted reasonably in their determination that no feasible and prudent alternatives exist that would avoid impacts to SMPP. Here, Plaintiffs have not met the high burden of showing that the Agencies' determination was arbitrary and capricious.

B. All Possible Planning to Minimize Harm

The Agencies contend that they have conducted all possible planning to minimize harm, as required by Section 4(f). Plaintiffs argue that what the Agencies have done is inadequate in that they have "largely put off planning to minimize harm until some future date." (Doc. 95 at 44). Plaintiffs claim that the promise of future planning does not meet the agency's statutory obligation. Additionally, they reiterate their argument that a 15% level of design was insufficient for the Agencies to conduct all possible planning to minimize harm. The Court, however, will not revisit that issue here. Just as Plaintiffs failed to show that a 15% level of design was a per se violation of NEPA's requirement to discuss mitigation measures, they have also not shown that without a greater level of

design, the Agencies could not conduct all possible planning to minimize harm.

The Court has reviewed the Agencies' discussion of measures to minimize harm to SMPP and to the South Mountains as a traditional cultural property. The discussion in Chapter 5 of the FEIS identifies many measures, some of which have already been undertaken and some of which will be taken as the project moves forward, to minimize harm to SMPP. For example, although an earlier proposal of the Freeway Project would have resulted in a direct use of over 40 acres of SMPP, the current design, as planned in the FEIS, would use approximately 31.3 acres of the 16,600-acre park, almost nine acres less than previously proposed. (FAR00001534). In addition, ADOT purchased additional land adjacent to SMPP, some of which was turned over to the City of Phoenix to replace parkland that would be converted to freeway use. (*Id.*). The Agencies plan to consult directly with the City of Phoenix Manager's Office during the design phase to consider further design measures that could reduce the land needed for the Freeway Project. (*Id.*).

In addition, the Agencies' discussion addresses measures to minimize the alteration of the SMPP landscape, including the implementation of design measures "to blend the appearance of the [ridgeline] cuts with the surrounding natural environment, as feasible." (FAR00001535). They further address measures to minimize intrusion on SMPP, including mitigation of noise impacts through the use of barriers, and visual intrusions through various landscaping methods. (*Id.*). Finally, the Agencies address measures to reduce impacts on SMPP access and habitat connectivity such as including in the design multifunctional crossings to provide access to SMPP for GRIC members; for hiking, equestrian, and bicycling uses; and for wildlife movement. (FAR00001536).

C. Cultural Resource and Cultural Property Impacts

GRIC explains that the Freeway Project will destroy portions of South Mountain known to GRIC as *Muhadagi Doag*, a sacred natural resource central to GRIC culture and religious practices. (Doc. 97 at 7). GRIC states that the Freeway Project in the SMPP area would destroy or interfere with trails, shrines and archeological sites of great importance to them. In the hearing, the Agencies acknowledged these concerns and

argued that they spent an extraordinary amount of time addressing these issues. In their motions, the Agencies also note that an entire chapter of analysis addresses GRIC's cultural property concerns. The Agencies state that pursuant to the National Historic Preservation Act (NHPA") and section 4(f), they entered into a Programmatic Agreement ("PA") with the State Historic Preservation Office (SHPO"), affected Indian tribal governments, federal agencies and others. (Doc. 109 at 21). That PA documents the Agencies' "legally binding commitments to the proper treatment and management of cultural Section 4(f) resources and by Section 106" of NHPA. (Doc. 108 at ¶ 10); (FAR00001477-78; FAR0001540-41; FAR00000069-71). *See HonoluluTraffic.com*, 742 F.3d at 1234 (citing 73 Fed.Reg. 13368-01, 13379-80 (2008) (recommending such agreement as "appropriate and desirable")). The FHWA also acknowledged that SMPP is eligible to be on the National Register of Historic Places and recommended mitigation measures to minimize harm, including to traditional cultural properties, to which the SHPO and GRIC Tribal Preservation Officer concurred. (FAR00001359; FAR00001861-2124; FAR00058135-36). The Agencies also note that the Department of the Interior provided its concurrence of their Section 4(f) process. (Doc. 104 at 43).

In that Section 4(f) process, the Agencies developed several measures to minimize harm, some of which have already been undertaken. For example, the Agencies will consult directly with GRIC during the design phase to consider further design measures that could reduce the land needed for the Freeway Project. (FAR 00001538). The FHWA also explained that it located alignment on a portion of the SMPP to provide access to and from the Community and fencing sensitive sacred or cultural areas to limit access to others. (FAR00000045-46). In addition, the Agencies will provide funds for an expanded study, in which GRIC has expressed interest, of the archeological and historical sites within the South Mountains. (FAR00001538). Measures to minimize the alteration to the landscape, to minimize intrusion on the South Mountains as a traditional cultural property, and to reduce impacts on access and habitat connectivity would be the same as the measures referenced above with respect to SMPP, and would involve input from GRIC. (*Id.*).

Plaintiffs argue that the Agencies failed to provide a meaningful discussion of measures to minimize harm, though Plaintiffs themselves fail to propose any specific measures that they believe the Agencies should have addressed but did not. The crux of Plaintiffs' argument is that the level of design for the freeway was insufficient, thus precluding the Agencies from conducting a meaningful analysis of measures to minimize harm. Applying the deferential standard, the Court is not persuaded. As discussed above, Plaintiffs simply have not demonstrated that the law requires a more complete level of design for purposes of addressing measures to minimize harm. Indeed as the Agencies argue, "Section 4(f) approval and the NEPA process must be complete *before* final design occurs." (Doc. 104 at 48) (citing 23 C.F.R. § 771.113(a)) (emphasis in original). Upon reviewing the Agencies' discussion of measures to minimize harm to SMPP and the South Mountains as a traditional cultural property, as summarized above, the Court finds no basis to conclude that it was arbitrary and capricious or otherwise in violation of Section 4(f). What is more, the Agencies acknowledge that their "measures to minimize harm are not empty promises; they are conditions of the federal-aid funding that are included as affirmative commitments in the ROD. (*Id*. at 43) (*citing* 23 C.F.R. § 635.309(j)). Thus, in evaluating the Agencies' compliance with Section 4(f) overall, the Court cannot find that the Agencies' decision to approve the use of Section 4(f) property was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Overton Park*, 401 U.S. at 416 (internal quotations and citation omitted).

V. Discussion of GRIC Wells

Lastly, GRIC contends that three of its wells are located in the direct path of the preferred alternative route for the freeway. GRIC claims that documents disclosed by ADOT, entitled "GRIC Well avoidance engineering schematics," instead of showing avoidance of the wells, actually show the freeway running directly over the wells and easements. GRIC argues that these wells cannot be taken or infringed upon by the construction of the Freeway Project. GRIC further argues that the Agencies' failure to consider a freeway design that avoids the GRIC wells, as the proposed freeway must, is a violation of NEPA.

In response, the Federal Defendants argue that, in compliance with NEPA, they have considered the impacts to the GRIC wells, and as many as 118 other groundwater wells potentially affected by the Freeway Project. The Federal Defendants contend that the GRIC wells, despite being held in trust by the Bureau of Indian Affairs, are not afforded "any greater rights than they would have under NEPA and its implementing regulations." (Doc. 104 at 49). However, both the Federal Defendants and the State Defendants explain that a binding requirement in the design and construction contract requires the freeway design to "avoid and preserve the GRIC well properties, GRIC's legal access to well properties, and the water wells, pipes, and ditches located therein." (Doc. 104 at 50; Doc. 109 at 53). The State Defendants emphatically assert that the Freeway Project "***will not take any GRIC property or otherwise impact GRIC wells.***" (Doc. 109 at 53) (emphasis in original). The Agencies argue therefore that because the design and construction contract legally binds the contractors from infringing on the GRIC wells, this issue is essentially moot.

At oral argument, the State Defendants further explained that if any change in the design to avoid infringing on the GRIC wells results in some shifting of the freeway alignment, the FHWA "is required to go through a reevaluation process to determine whether the change in the project design will – has the potential to result in any new significant impacts." (Doc. 129 at 130). "[I]f the agency determines that there will be a potential for significant impact, a supplemental Environmental Impact Statement is required." (*Id.*). Thus, the State Defendants contend that if it is discovered that design changes to the project (in this instance to avoid GRIC wells) may have impacts that were not sufficiently disclosed, there is a well-established process in the law to address such developments.

The Court finds no violation of NEPA with respect to the GRIC wells. The Agencies demonstrated that they did consider the impact to the GRIC wells, along with up to 118 other wells, in compliance with NEPA. The fact that GRIC has chosen to retain control of and access to the three wells, which it has the right to do, does not alter the Court's conclusion. Given GRIC's decision to hold on to the three wells, the

Agencies imposed a contractual obligation with respect to the design and construction of the Freeway Project to avoid the wells. Further, as argued by the State Defendants, and as established in 23 C.F.R. §§ 771.129 and 771.130, there is a mechanism in place for the Agencies to conduct a re-evaluation and, if necessary, prepare a supplemental EIS if any alterations to the freeway alignment due to avoidance of the wells would result in significant environmental impacts that were not previously evaluated. Thus, depending on what types of alterations are necessary to avoid any impact to the GRIC wells, the Agencies may or may not be required to re-evaluate and issue a supplemental EIS. Because the Agencies are legally bound to comply with that process if the circumstances require it, the Court finds no basis to find that the Agencies' current actions constitute a violation of NEPA.

VI. Conclusion

For the foregoing reasons, the Court finds that Plaintiffs have not established that the Agencies' analysis and approval of the Freeway Project violated NEPA or Section 4(f). Plaintiffs have not met their burden to show the Agencies' actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ." or "without observance of procedure required by law." *See* 5 U.S.C. § 706(2)(A), (D).

Accordingly,

IT IS ORDERED that the Cross-Motions for Summary Judgment filed by the Federal Defendants (Doc. 102) and the State Defendants (Doc. 107) are **GRANTED** and that the Motions for Summary Judgment filed by the PARC Plaintiffs (Doc. 95) and GRIC (Doc. 97) are **DENIED.** The Clerk of Court shall enter judgment accordingly.

Dated this 19th day of August, 2016.

Honorable Diane J. Humetewa
United States District Judge